

MEMORANDUM

I have revised the suggested form of motion to avoid lien. The primary changes are as follows:

First, I now permit attaching Schedule C in lieu of describing each item of property or type of property. If Schedule C has been amended, the complete Schedule must be shown.

Second, the amended form points out more clearly that with respect to multiple liens, particularly multiple judicial liens, all of the liens ought to be dealt with in one motion, i.e., all lienholders should be named as respondents in the same motion. This is because section 522(f)(2)(B) states:

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

If there is more than one judgment lien, it is impossible to figure out whether one or both liens are avoidable without considering them in accordance with section 522(f)(2)(B). That is, one must examine each lien in the context of all other unavoids and unavoidable liens. So, you start with the most junior lien and figure out whether it is avoidable in its entirety. If it is not avoidable or is avoidable only in part, then all senior liens will be unavoidable. If on the other hand, the most junior lien is avoidable in its entirety, you then examine the next most junior lien and do the computations as if the lien that is the fully avoidable most junior lien never existed. Repeat if there are more than two potentially avoidable liens.

SUGGESTED FORM OF MOTION TO AVOID LIEN

[Style of case, including contested matter info: names of Movant and Respondent or Respondents. NOTE that if there are two or more entities with liens against property claimed as exempt, **the motion should include all lienholders as respondents**, noting the relative priorities of their liens in order to do the arithmetical analysis required by section 522(f)(2)(B). See Lien Avoidance Worksheet.]

Motion To Avoid Lien(s)

X, Debtor in this bankruptcy case, moves for an order avoiding a lien held by the Respondent(s) pursuant to 11 U.S.C. § 522(f) and alleges as follows:

(NOTE to Paragraph 1: choose the appropriate paragraph no. 1 applicable to the facts in your case from the two alternatives below or combine them if there is both a judicial lien and a nonpossessory, nonpurchase money security interest attaches to the same property.)

1. Respondent obtained a judgment against Debtor on or about [Date] in the [Court Rendering Judgment] and the amount of that judgment lien on the petition date was \$_____.

OR

1. Respondent holds a nonpossessory, nonpurchase-money security interest created by a security agreement between Debtor and Respondent dated on or about [Date] in the property described below to secure a debt in the amount of \$ _____ as of the petition date.

NOTE to Paragraph 2: Paragraph 2 deals only with the situation in which the amount claimed as exempt is equal to or greater than the value of the property. For example, if the debtor claims an exemption of \$500 in property that is worth \$500 or less, a lien against that property will *always* impair the claimed exemption. Do not use this paragraph unless you have inspected Schedules A, B and C and have compared the values.

Choose one or the two versions of Paragraph 2 below; the first one requires you to attach Schedule C and all amendments, and the alternative requires you to describe each item or type of exempt property.

2. Pursuant to 11 U.S.C. § 522 and O.C.G.A. § 44-13-100, Debtor properly claimed as exempt the property shown on the attached Schedule C, including all amendments, if any. Except as appears on the attached Schedule C, the value of each claimed exemption in the property shown on Schedule C is equal to or greater than the market value of that property as reflected on Schedules A and B.

OR

2. Pursuant to 11 U.S.C. § 522 and O.C.G.A. § 44-13-100, Debtor properly claimed as exempt on Schedule C the following property:

[Describe Property, e.g., Household furnishings, household goods, jewelry, appliances, etc.]

Except as otherwise noted above, the value of each claimed exemption in the property shown on Schedule C is equal to or greater than the market value of that property, as accurately reflected on Schedules A and B.

NOTE to Paragraph 3: Paragraph 3 below deals with what paragraph 2 does not cover – the situation in which the value of the property claimed as exempt is greater than the amount of the claimed exemption. There are four variables to be considered in determining whether a particular lien is avoidable – (1) the value of the debtor’s interest in the property, (2) the amount of the exemption, (3) the aggregate amount of the liens other than the one to be avoided and (4) the amount of the potentially avoidable lien.

If there are two or more liens, determine first whether the most junior lien is avoidable in its entirety. If it is not, then all senior liens will be, by definition, unavoidable. If the most junior lien is totally avoidable, the computations must then be repeated for the remaining liens in the reverse order of seniority, leaving out of the successive computations the amount of the more junior liens that you have already found are fully avoidable.

Paragraph 3 below assumes that you will attach to the motion one or more Lien Avoidance Worksheets showing the arithmetic for each lien. Paragraph 3 by itself is not sufficient without attaching a Lien Avoidance Worksheet(s). If you do not wish to use the Lien Avoidance Worksheet, you must allege in the motion facts necessary to show that a lien is avoidable, including the amounts of all liens against the property and the names of the holders of those liens, their relative priorities, the value of the debtor’s interest in property to which the lien has attached and the amount of the claimed exemption in that property.

3. Pursuant to 11 U.S.C. § 522 and O.C.G.A. § 44-13-100, Debtor properly claimed as exempt on Schedule C the property described below in this paragraph. Respondent’s lien on this property impairs the claimed exemption(s), as shown in the attached Lien Avoidance Worksheet(s).

Property	Amount To Be Avoided	Amount Not Avoidable

Wherefore, Debtor is entitled to entry of an order avoiding Respondent's lien against the exempt property as set forth above.

Date

Signature

Lien Avoidance Worksheet

Line	Property Description:			
1	Debtor's Interest (Percentage Ownership of) Property: ____%		Value of All Interests in Property: \$_____	
2	Value of D's Interest in Property (From Line 1: % x Tot. Value			\$
3		Check (✓) Respon- dent(s)	Name of Lienholder	Amt. of Lien Based on Debtor's Interest
4	1st Priority Lien			\$
5	2nd Priority Lien			\$
6	3rd Priority Lien			\$
7	4th Priority Lien			\$
8	Exemption Claimed (Sched. C)			\$
9			Total of Liens and Exemption (Lines 4 through 8)	\$
10			Total of Liens and Exemption (Line 9) less Value (Line 2)	\$
Analysis	<p>CHECK APPLICABLE BOX(ES)</p> <p><input type="checkbox"/> Line 2 (Value of D's Interest) is GREATER THAN or EQUAL TO Line 9; STOP! Lien is NOT avoidable.</p> <p>or</p> <p><input type="checkbox"/> Line 2 (Value) is less than Line 9; CONTINUE.</p> <p style="padding-left: 40px;"><input type="checkbox"/> Line 10 is GREATER THAN or EQUAL TO Line ____ (on which Respondent's Lien appears). Lien is avoidable in its entirety.</p> <p style="padding-left: 40px;"><input type="checkbox"/> Line 10 is LESS than Line ____ (on which Respondent's Lien appears). Lien is avoidable by the amount stated on Line 10. Lien is not avoidable in the amount equal to the difference between the amount of Respondent's Lien and the amount stated on Line 10.</p>			

NOTES TO LIEN AVOIDANCE WORKSHEET

(1) The value of the Debtor's interest in property is the value of the property multiplied by the Debtor's percentage of ownership. If the Debtor owns an undivided 50% interest, the value of his interest is one-half the total value. The amounts of liens MAY need adjustment if the Debtor is not the sole owner. Suppose that a debtor and a co-owner (who could be the spouse of the debtor) each own an undivided 50% interest in the property securing a first mortgage note. For section 522(f) purposes, the amount of the first mortgage lien on the petition date attributable to that debtor would be one-half of the amount owed on the first mortgage. If that debtor had obtained a second mortgage against only his one-half interest, there would be no adjustment in the amount of the second mortgage lien.

(2) Complete Line 10 and file the motion with respect to the identified property ONLY if Line 2 (Value of Debtor's Interest in Property) is less than Line 9.

(3) If the debtor has a spouse, pay very careful attention to who owes the debt and to whose interest in property a lien attaches. Analysis under section 522(f) should be done separately for each joint debtor and for a debtor and a non-filing spouse if either (A) only one of them owns the property subject to a potentially avoidable lien or (B) the judgment or security interest is enforceable against one debtor but not the other or not the non-filing spouse.

(4) **Read section 522(f).** The only avoidable consensual liens are nonpossessory, nonpurchase money security interests attaching to the following property:

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or (iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

11 U.S.C. § 522(f)(1)(B). **Consensual liens on vehicles** are **not** avoidable because vehicles are **not** listed in section 522(f)(1)(B). Tax liens, mechanics liens and other statutory liens are **not** avoidable.

(5) **Read Ga. Code Ann. § 44-13-100.** Do not list on Schedule C property not exemptible under this statute and do not claim an exemption amount larger than that permitted by this statute. Real Estate not used as a residence by the debtor or a dependent of the debtor is NOT exemptible under the homestead exemption, O.C.G.A. section 44-13-100(a)(1), but is exemptible under O.C.G.A. 44-13-100(a)(6).

(6) If there is more than one avoidable lien on the property, begin the avoidance analysis with the most recently filed lien. If it is avoidable entirely, then repeat for the next most junior lien, etc.

(7) If the amount of the exemption claimed is greater than or equal to the value of the Debtor's interest in an item of property, an avoidable lien on that property will always impair the exemption. For example, if the value of the household goods stated on Schedule B is \$1,000 and the amount of the exemption claimed for household goods is \$1,000, any avoidable lien will impair the exemption. Do not use the Worksheet in this circumstance.

(8) If the value of the exempted property shown in Schedule C is "unknown," Line 1 must be left blank, and it would be impossible to determine whether a lien would impair the exemption, and hence a motion to avoid a lien on unvalued property will always be denied.